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APR 5 - 2005

No. 04-1213

In The

Supreme Court of the United States

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Petitioner,

v.

EIJINIO BANUELOS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

EIJINIO BANUELOS' BRIEF IN OPPOSITION

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RESPONDENT EIJINIO BANUELOS' BRIEF IN OPPOSITION TO CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA'S PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. § 1003 et seq., also known as ERISA, by respondent Eijinio Banuelos against petitioner Construction Laborers Pension Trust for Southern California (CLPT) for denied retirement benefits.

The Court of Appeal for the Ninth Circuit as well as the District Court for the Central District of California, the latter in disposing of cross-motions for summary judgment, accurately stated many of the pertinent facts related to Respondent Banuelos' claim.

Banuelos had worked 25 years in the construction industry earning approximately 16,000 hours of service credits and was deemed vested by CLPT. However CLPT determined that upon reaching retirement age, i.e., 65, Banuelos could not receive his pension unless he worked an additional 501 hours in a year, after reaching 65, to cure certain temporary service breaks incurred in several years just prior to his retirement. Since it is difficult to secure or perform 501 hours of construction labor per year after the age of 65, Banuelos appealed to CLPT's appeals committee citing Section 4.07(e) of the pension plan verbatim, which permitted him to get his pension upon turning 65 without having to work the additional 501 hours. In denying Banuelos' appeal, the pension department manager cited the section in question as the basis of the appeals committee's denial. Banuelos filed his case in

federal court seeking review of CLPT's decision that denied him a pension.[1]

Cross-motions for summary judgment were filed, as is usual in ERISA cases where the plan administrator has discretionary authority to determine benefit eligibility. Among other things, CLPT presented the declarations of some of its attorneys and officials that the section cited by Banuelos in his appeal to the appeals committee was adopted in error. No such evidence appeared in the administrative record or, for that matter, in any other records of CLPT. Rather, its records, including its minutes, reflected that Section 4.07(e) had in fact been duly adopted by CLPT just as Banuelos had quoted it in his appeal.

Unexpectedly, the district court denied both summary judgment motions and sent the case to bench trial, the only issue being whether Section 4.07(e) had been adopted by CLPT in error. Thus when Banuelos filed his case, he thought the district court would merely review the administrative decision of CLPT and determine whether or not he was entitled to a pension. Instead, he was reluctantly forced to defend against what served as a complicated reformation action on behalf of CLPT, a task for which he was ill-suited. Ultimately the district court issued a judicial declaration revising CLPT's plan documents as well as various other trust records. Banuelos appealed the

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[1] Under the pension plan, CLPT had discretionary authority to determine benefit eligibility. Therefore, the district court's role was to review the administrator's determination for abuse of discretion. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). In his lawsuit Banuelos also claimed, among other things, that the post retirement-age 501 hour work requirement violated ERISA.

district court's decision, specifically targeting the court's denial of his summary judgment motion.[2]

The Ninth Circuit reversed, holding that the district court judge was limited to a ruling based on the record, which included Section 4.07(e) as quoted and presented by Banuelos' in his appeal to CLPT's appeals committee. Based upon that record, Banuelos was entitled to his retirement pension as a matter of law.

In the guise of arguments about circuit court conflicts and procedural irregularities, CLPT attacks the Ninth Circuit's decision. However, its arguments are entirely without merit.

I. CLARIFICATION OF THE RECORD.

The facts as presented by CLPT in the Petition (pp. 2-7) are highly distorted when compared with what the record below truly reflects.

In September of 1998, pursuant to an official request for documents under 29 U.S.C. §§ 1021 and 1132(c), addressed and mailed to the trustees and administrators of Construction Laborer Trust Funds, respondent's attorney requested "(1) the initial pension plan plus all modifications, (2) the last available summary plan description together with all modifications, (3) the trust agreement or other instruments under which the plan was established."

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[2] Contrary to CLPT's assertion on page 6 of its Petition, Banuelos never abandoned his appeal of the trial court's judgment. Attacking the trial court's denial of his summary judgment motion as the focus of his appeal does not constitute an abandonment of his appeal of the trial court's judgment.

By letter dated September 8, 1998, the pension department supervisor responded: "Pursuant to your letter of September 1, 1998, I am enclosing the Construction Laborers Pension Plan Document, Summary Plan Description dated May 1979 with enclosed blue inserts on amendments through 1986, plus amendments through 1997." The Construction Laborers Pension Plan Document received by respondent's attorney was labeled "Pension Plan Of The Construction Laborers Pension Trust For Southern California (as amended to June 30, 1994)."

Page 43 of the document contained Section 4.07(e) which purported to entitle respondent to a vested pension with five years of service credits without any additional 501 hour per year work requirement after he reached 65, i.e., the age of retirement.[3] CLPT possessed no other updated comprehensive written plan document until its attorneys created one after Banuelos filed his lawsuit.

Contrary to CLPT's presentation of the facts on page 3 of the Petition, that the language quoted in Banuelos administrative appeal "was not the language of Section 4.07(e) of the Pension Plan of the Trust," all of CLPT's records including the approved minutes of several of its

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[3] Petitioner makes much ado about nothing when it points out that the 1994 Pension Plan was mailed to respondent's attorney in response to a request on behalf of a co-worker of respondent who the attorney was also representing at about the same time. However, CLPT failed to show that it had ever sent out any different set of documents in response to an official request between 1994 and the date Banuelos filed suit. Moreover, when Banuelos cited Section 4.07(e) verbatim in his appeal to CLPT's pension appeals committee in 1999, CLPT never objected that such language was not contained in its pension plan nor did it even voice any inquiry about the source of the Section 4.07(e) language. Rather, it confirmed the existence of Section 4.07(e) by citing it by amendment number as a basis for the appeals committee decision.

board meetings and various other business documents reflected that, indeed, the language of Section 4.07(e) was exactly as quoted.

Moreover, in denying Banuelos' appeal, the pension department manager noted that "**in accordance with plan rules under Amendment 93-1-P, Mr. Banuelos became vested under ERISA Plan One when he attained age 65**." Amendment 93-1-P was precisely the amendment number assigned to Section 4.07(e) as it appeared on page 43 in the 1994 version of the CLPT pension plan.

Notably, CLPT failed to quote to the Supreme Court its version of the language of Section 4.07(e) of the pension plan because nothing other than what Banuelos' cited verbatim in his appeal existed under 4.07(e) until after Banuelos filed this case in district court.

REASONS FOR DENYING THE WRIT

I. CLPT HAS NOT SET FORTH AN APPROPRIATE BASIS FOR JUSTIFYING DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. A petition for a writ of certiorari will be granted only for compelling reasons." *Id.*

A. DIFFERENCES BETWEEN THE CIRCUIT COURTS WITH RESPECT TO INTERPRETING PROCEDURAL RULES NORMALLY IS NOT A BASIS FOR GRANTING REVIEW.

CLPT's attack on the Ninth Circuit's review of Banuelos' denied summary judgment motion (pp. 8-17) fails to state any past basis for Supreme Court review.

On the contrary, the Supreme Court has stated that differences between the way the various circuits interpret the appellate rules is not a basis for Supreme Court intervention. Rather, the issue is whether a circuit's interpretation of the rules is reasonable. See *Ortega-Rodriguez v. United States*, 507 U.S. 234, 244, 251 n.24, 113 S.Ct. 1199, 122 L.Ed.2d 581 (1993); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

Throughout the circuits, the general rule is that a denied summary judgment motion is not subject to review after the case has been subject to a full blown trial on the merits. However, almost every circuit that has ruled on the matter goes along with the Ninth holding that reasonable exceptions should be permitted in appropriate cases. See *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719-720 (7th Cir. 2003), setting forth various cases from the Third, Sixth, Eighth, Ninth, Tenth, and Federal Circuits permitting appellate review of a denied summary judgment motion. See also *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125, 131 n.4 (2nd Cir. 1999) and *Johnson v. Sawyer*, 120 F.3d 1307, 1318 (5th Cir. 1997) for exceptions in the Second and Fifth Circuits, respectively.

In the case at bar, an exception is clearly reasonable, because Banuelos never received a full blown trial on the merits of his claim to a pension. Rather, the bench trial

was limited to matters concerning CLPT's mistakes, with the court refusing to rule on the merits of Banuelos' alternative claims which instead were remanded back to CLPT.

ERISA cases also are a reasonable exception to the general rule because pension claimants such as Banuelos file their lawsuits in federal court, expecting that the court will decide the case based upon summary judgment motions limited to a review of the administrative record. Such claimants are not in a position to meaningfully participate in a trial regarding what may or may not have been mistakes in the pension plan's business records and practices, especially when those mistakes occurred over the course of many years. Furthermore, the pension claimant is not entitled to a court trial where he can introduce oral testimony contradicting the pension administrator's records regarding, for example, his service breaks. *Firestone, supra, Taft v. Equitable Life Insurance Society,* 9 F.3d 1469, 1471 (9th Cir. 1993). Is it fair to allow pension administrators recourse to oral testimony to defeat claims where pension claimants cannot do likewise to support their claims?

In summary, the circuits review numerous cases in a wide variety of situations where a denied summary judgment motion may be at issue. Is the Supreme Court in a position to articulate a "one size fits all" rule as to when a circuit court should or should not review a denied summary judgment motion? With all due respect, the answer should be "no." The circuit courts are in a better position to do this because they review thousands of tried cases every year and can therefore better develop reasonable rules in this area.

B. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ERISA, NOR DOES IT USURP ANY AUTHORITY GRANTED TO THE SECRETARY OF LABOR.

On pages 19 and 20 of the Petition, CLPT claims that it complied with 29 U.S.C. § 1135 as well as DOL requirements that it provide Banuelos with a full and fair review. Clearly it did not, because it neither provided him with relevant specific reasons for its adverse determination nor with a description of any additional material or information necessary for him to perfect his claim.

But even if it had complied with § 1135 and the regulations, CLPT has failed to cite any authority that ousts federal courts from reviewing the legal conclusions of a plan's decisions. *Black and Decker Disability Plan v. Nord,* 538 U.S. 822, 123 S.Ct. 1965, 144 L.Ed.2d 1034 (2003) is of no help to CLPT here, because that case merely decided whether ERISA's provisions mandated health plans to use a *specific* evidentiary rule to decide cases. Here, the Ninth Circuit merely reviewed the records applicable to Banuelos' claim and found that, based on those records, he was legally entitled to a pension. It mandated no specific evidentiary rules as to how CLPT or any other pension must deal with future cases.

II. IN THIS CASE A REMAND TO THE APPEALS COMMITTEE TO RECONSIDER THE FACTS IN LIGHT OF THE NINTH CIRCUIT DECISION WOULD HAVE SERVED NO PURPOSE.

Remand is inappropriate where there are no issues left to be resolved by the pension administrators because the facts can lead to only one legal conclusion. *Bergt v.*

Retirement Plan for Pilots Employed By Markair, Inc., 293 F.3d 1139, 1146 (9th Cir. 2002). There are no remaining factual issues here, because CLPT's documents speak for themselves.

This Court has recognized the paramount importance of written plan documents so that every employee, on examining same, can determine exactly what his/her rights and obligations are under the plan:

> ERISA . . . *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents. The basis of that scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument.*" 29 U.S.C. § 1102(a)(1) (emphasis added). In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, *on examining the plan documents,* determine exactly what his rights and obligations are under the plan." H. R. Rep. No. 93-1280, p. 297 (1974) (emphasis added). *Curtiss-Wright Corp. v. Schoonejongen* 514 U.S. 73, 83. 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995).

Throughout its Petition herein, CLPT has called the 1994 Pension Plan such names as "a rogue document," "unauthorized," "the attorney's work product," and the like. The problem is that post mortem, oral epithets and explanations by CLPT's attorneys and officials are not only dubious, self-serving and too late, but they frustrate the policy of ERISA, mandated by Congress, that an employee be in a position to determine what his options are by studying the Plan's written documents.

If the 1994 Pension Plan was anything other than what it purported to be, the onus was on CLPT, its attorneys and officials to label it correctly, not on Banuelos to guess at what snares he might encounter by relying on it.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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